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Issue Date: 06 December 2005

CASE NO.: 2005-LHC-00729

OWCP NO.: 01-155322

In the Matter of

JOHN C. FIRCZAK
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

Appearances:

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Stephen Hessert, Esquire (Norman, Hanson & DeTroy), Portland, Maine for the Employer/Self-Insured

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

In a claim brought under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"), John C. Firczak (the "Claimant") seeks an award of workers' compensation benefits from his former employer, the Bath Iron Works Corporation ("BIW"), alleging that he is permanently disabled due to limitations imposed by a work-related injury to his head and neck. The parties were unable to resolve the claim through informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and that office transferred the case to the Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA. 33 U.S.C. § 919(d).

Pursuant to notice, a hearing was conducted in Portland, Maine on May 24, 2005, when all interested parties were afforded an opportunity to present evidence and argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf

of BIW. The Claimant and a vocational expert called by BIW testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-13 and BIW Exhibits ("EX") 1-37. Hearing Transcript ("TR") at 9-10. At the close of the hearing, the parties were granted leave to offer additional evidence and to file post-hearing briefs. TR 54. Within the time allowed, BIW offered the transcript of testimony taken from John Pier, M.D. at a deposition on June 20, 2005 which has been admitted without objection as EX 38. Both parties submitted briefs and the record is now closed.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant is entitled to an award of compensation for permanent total disability plus interest on unpaid compensation and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. The Claim, Stipulations and Issues Presented

The claim is for continuing permanent total disability compensation from September 8, 2004 based on an injury that the Claimant sustained to his head and neck while at work on March 4, 2002. TR 7-8. At the hearing, the parties stipulated that the Claimant's average weekly wages at the time of the injury were $666.74 and that he reached a point of maximum medical improvement from the injury on September 8, 2004. TR 8. The Claimant also agrees that BIW has been paying him temporary total disability compensation. Claimant Brief at 2. BIW contends that the Claimant can perform suitable alternative employment and that any disability, therefore, is partial in nature. The sole issue presented is whether the Claimant is totally disabled as a result of the March 4, 2002 work-related injury. BIW Brief at 6.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, who was 43 years old at the time of the hearing, has a 10th grade formal education and obtained a GED when he was 18 years old. TR 14-16, 60-61. Prior to working at BIW, the Claimant was employed as an electrician on residential and commercial construction projects. TR 15. He was hired by BIW as a marine electrician on January 5, 1988. TR 16; EX 14 at 19.[1] This job consisted of pulling overhead cables and doing simple electrical hookups aboard ships. TR 16, 18, 60.

On March 4, 2002, the Claimant was injured at work when he struck his head on a steel light foundation while climbing a ladder. TR 20-21, 46-47. He was wearing a hard hat which was not broken, and he did not lose consciousness. TR 47. However, he testified that he fell to the floor and felt a "burning, tingling" tingling sensation from the top of his head to the back of

[1] The parties' exhibit packages are numbered sequentially with each page bearing a "Bates Stamp" page number in the lower right corner. Citations to all exhibits will be to the exhibit number and Bates Stamp page number with the exception of EX 38, the transcript of Dr. Pier's deposition, which is not Bates Stamped. Page citations to EX 38 are to the transcript page numbers.

his neck and ringing in his ears. TR 20-21.[2] He also testified that he had frequently struck his head while working in the past but never as hard as he did on this occasion. TR 21. After a short break, he continued working for the remainder of the shift and worked for several more days, but he sought treatment from BIW's first aid department on March 12, 2002 because he was experiencing "major pain." TR 21.

After reporting to the first aid department, he was referred to Parkview Hospital for further evaluation. TR 21-22; EX 16 at 116. He underwent a MRI of the cervical spine which showed degenerative disc disease most prominent at C3-4 and C5-6, with a central disc protrusion and foraminal encroachment on the right at C5-6 greater than left. EX 26 at 173. The attending physician at Parkview Hospital held the Claimant out of work, with a possible return on March 14, 2002. *Id.* at 175. On March 13, 2002, the chief of BIW's Medical Department, Maria Mazorra, M.D., held the Claimant out of work until March 18, 2002. TR 23; EX 16 at 110-112. Dr. Mazorra subsequently referred him to a neurosurgeon and orthopedic specialist who determined that he was not a surgical candidate. TR 22-23. On July 11, 2002, Dr. Mazorra restricted Claimant from working overhead, in confined spaces and areas with low-lying equipment and from lifting in excess of 25 pounds. EX 16 at 87. At that time, BIW placed the Claimant out of work because there was no work available within Dr. Mazorra's restrictions. *Id.* at 88.

On March 12, 2003, K.N.M. Barth, M.D., a neurosurgeon, performed a left C-2 ganglionectomy to relieve the Claimant's "refractory occipital neuralgia." CX 4 at 19. Following the surgery, Dr. Barth noted on May 6, 2003 that the Claimant "[u]nfortunately . . . continues to experience neuropathic pain in the same distribution, which is not improved." CX 3 at 17. Dr. Barth further stated that it was his "impression . . . that Mr. Firczak has done poorly with surgery, and unfortunately, I am out of options." *Id.* The Claimant has not been able to return to work at BIW since undergoing the surgery with Dr. Barth. TR 24.

Following an evaluation in August of 2003 by Dr. Pier, whose opinions are discussed below, the Claimant requested vocational rehabilitation assistance from the OWCP which assigned vocational counselor Nancy Bogg to provide rehabilitation services. TR 24; EX 15. Ms. Bogg met with the Claimant and his attorney and reported that the Claimant chose to pursue job placement and on-the-job training, rather than a formal education program. *Id.* at 22. In February of 2004, the Claimant secured a part-time job through Pathways, Inc., an agency that places disabled workers. TR 25-26. The job involved stocking shelves in the commissary store at the Brunswick, Maine Naval Air Station where the job requirements were modified to accommodate his limitations. TR 25; EX 15 at 44. The Claimant testified that he worked two four-hour shifts but was unable to continue because of pain. TR 27-28, 56. EX 15 at 51. His schedule was then reduced to two hours per evening, but he testified was unable to tolerate even the reduced hours because of an increase of the burning sensation in his neck that was brought on

[2] BIW points out that none of the contemporaneous medical reports contain any mention of the Claimant falling after he struck his head, a discrepancy which, BIW argues, raises serious questions about the Claimant's credibility. BIW Brief at 9. When cross-examined about this point, the Claimant testified that he did not remember whether he told the BIW first aid department that he had fallen. TR 47. The Medical Encounter form completed by BIW's occupational medicine chief on March 12, 2002 states that the Claimant reported "an injury approximately 1 week ago when he struck his head being pushed down on his neck as an accordion. He had no loss of consciousness" EX 16 at 115.

by his stocking duties. TR 28, 57-58; EX 15 at 54. He further testified that he reported his difficulties to his treating physician who advised him not to go back to work. TR 29. Records from Pathway, Inc. indicate that the Claimant worked a total of eight two-hour shifts at the commissary store between March 9, 2004 and March 18, 2004. EX 15 at 58. Based on the Claimant's failure to physically tolerate the physical demands of even a part-time, accommodated job, Ms. Bogg concluded that vocational rehabilitation was not feasible. EX 15 at 55-56.

The Claimant testified that he continues to suffer pain and burning from the top of his head to the back of his neck on a constant basis. TR 30. On a good day, he said the pain in his head is "lousy" but he will walk to his parents' home, a distance of approximately 900 feet, to talk in the garage or watch his parents work in the garden. TR 30-31, 38, 41, 67.[3] He testified that he has attempted to mow his lawn but had to quit after 20 minutes due to pain. TR 31. He has also tried to shovel snow, but found shoveling too painful, so he bought a snowblower that his wife uses. TR 67. He said that he does minimal driving and prefers to have his wife do most of the driving because he has difficulty turning his head from side to side and does not feel safe backing the vehicle. TR 32-33. He does, however, drive to a local convenience store to buy cigarettes. TR 40-41, 65-66. Before his injury, the Claimant went hunting and fishing and played golf, softball, pool and horseshoes, but he has not engaged in any of these leisure activities since the injury. TR 35-36. He said that his household chores are limited to occasional vacuuming and that reading and pushing a grocery cart are too painful. TR 36-37, 40. He testified that on a bad day, when his symptoms are particularly severe, any activity will increase his pain so that he spends most of the day in a recliner. TR 38-39. The Claimant testified that his current treating physician is Dr. Muscat and that he has not been released by Dr. Muscat to attempt any work. TR 29, 42. For management of his pain, Dr. Muscat currently prescribes a Duragesic patch, Hydrocodone, and Effexor. TR 29, 61-63. Aside from the unsuccessful attempt to work at the commissary store, the Claimant has not worked or applied for any work since leaving BIW. TR 59.

B. Medical Opinions and Work Restrictions

The Claimant's initial work restrictions were written by Dr. Mazorra who prohibited him from working overhead, in confined spaces and areas with low-lying equipment and from lifting in excess of 25 pounds. EX 16 at 71, 87. On October 8, 2002, Dr. Mazorra referred the Claimant to Paul Muscat, M.D. for a neurological consultation. *Id.* at 72. Dr. Muscat's initial impression was chronic axial pain of uncertain etiology which he attempted to treat with medication, physical therapy, chiropractic TENS and acupuncture. CX 6 at 25, 27, 29. When the Claimant did not obtain satisfactory relief from the conservative measures, he elected for surgery with Dr. Barth. As discussed above, the surgery, unfortunately, failed to alleviate his symptoms, and Dr. Barth referred him back to Dr. Muscat on May 6, 2003, concluding that he was "out of options" and suggesting that "this is a situation for which there is no cure and that the goal in treatment ought to be simply toward managing his symptoms." CX 3 at 17. At that time, Dr. Barth completed a State of Maine Practitioner's Report (Form M-1) in which he

[3] The Claimant testified that he knows the distance from his home to his parents' is 900 feet "because we measured it." TR 38.

reported that he expected that the Claimant would be permanently impaired and that he was unable to determine when the Claimant would be able to return to work. *Id.* at 18.

Dr. Muscat has also completed several M-1 forms on which he has consistently reported that the Claimant has no work capacity. CX 6 at 34 (10/10/03), 35 (12/09/03), 37 (2/12/04), 38 (5/17/04), 42 (12/20/04). The Claimant testified that he brought the M-1 forms in to Dr. Muscat and simply asked him to fill the forms out for BIW. TR 55. He also testified that Dr. Muscat told him that he does not perform work capacity evaluations. TR 54. However, Dr. Muscat apparently did approve of the Claimant's attempts at vocational rehabilitation, noting in an October 10, 2003 report that,

> We talked to some extent about other vocational possibilities, and this is also being reviewed with Dr. Attfield. While I am not sure that he can return to his previous position at BIW, I certainly think that some sort of work would be a good idea.

CX 6 at 33. Dr. Attfield is a clinical neuropsychologist specializing in treatment of chronic pain who conducted a behavioral medicine consultation at Dr. Muscat's request on September 25, 2003. CX 2; CX 6 at 30. Regarding the Claimant's psychological capacity for work, Dr. Attfield stated,

> Although Mr. Firczak appears to be experiencing an adjustment disorder secondary to his pain condition with well-articulated pain strategies, he appears to have the psychological capability to reestablish himself in the work environment or pursue some type of vocational goal. He is an engaging an articulate young man with a set of practical skills that he could use to establish goals for himself.

Id. at 9. The Claimant has continued to be followed by Dr. Muscat. In a September 8, 2004 letter to the Claimant's attorney, Dr. Muscat wrote that he felt the Claimant had reached a point of maximum medical improvement with little chance of improvement from further therapy, and he stated that it was unlikely that his neuropathic pain syndrome would spontaneously improve. CX 6 at 39.

The Claimant was also evaluated on August 11, 2003 by John Pier, M.D., a board-certified physical rehabilitation and pain medicine specialist. EX 18. Dr. Pier concluded that the Claimant has a work capacity, and he completed a M-1 form in which he indicated that the Claimant could minimally (defined as up to 9 minutes per hour) do overhead work and climb; occasionally (defined as up to 21 minutes per hour) push/pull, kneel/crawl, stoop and lift up to 15 pounds; and frequently (defined as up to 42 minutes per hour) twist and bend. *Id.* at 135. He noted on the form that "headaches will limit concentration" and in his report that "[s]evere headaches may limit his reliability." *Id.* at 135, 138. Regarding the headaches, Dr. Pier stated that the Claimant's complaints are consistent with cervicogenic headaches, and he stated that the "severity of his complaints are certainly greater than one would expect, but within the realm of possibility." *Id.* at 138.

Dr. Pier's testimony was taken at a post-hearing deposition on June 20, 2005. EX 38. He testified that he performs work capacity evaluations on a regular basis. *Id.* at 5. Since Dr. Pier is associated with the same practice as Dr. Barth, the neurosurgeon who operated on the Claimant, he was asked about whether neurosurgeons also perform work capacity evaluations, and he responded that neurosurgeons generally refer patients to his side of the practice (*i.e.*, physical rehabilitation) for such evaluations. *Id.* at 6. Dr. Pier testified that the Claimant was referred to him by a firm that assists the BIW Workers' Compensation Department. *Id.* at 7. He discussed the Claimant's diagnostic studies including the MRI and his examination findings at length, and he concluded, "[i]t was a relatively benign exam, but I think . . . that's not unusual in individuals with cervicogenic headache." *Id.* at 13-14. He further stated that while the Claimant's examination was benign, the lack of objective findings of significant abnormality is "not entirely inconsistent with his subjective report, either." *Id.* at 14. Dr. Pier testified that his opinion of the Claimant's work capacity is set forth in the M-1 form that he completed. *Id.* at 15. He was asked about the work restrictions that he outlined in the M-1 and stated,

> It's very conservative from a physical standpoint, yes. I mean, there is a good chance he could do physically more than this. I think his major limitation was in the fact that he had a headache, and it's very difficult to provide physical work restrictions for something that is such a subjective pain experience.

Id. at 17. Dr. Pier was also questioned about a statement in his report that the Claimant could benefit from a "focus on returning to activities rather than simply on his perceived disability and inactivity" (EX 18 at 138), and explained,

> He was, at least by history, still able to function a little bit during the day and accomplish some daily tasks. Certainly they were not unlimited, but my concern was that he had such extensive treatment, and it all appeared to be very appropriate, and he still had complaints of discomfort. And, in any chronic pain state, you try to, from a pain management standpoint, focus on activities rather than simply on pain. Always easier said than done.

Id. at 18. Dr. Pier testified that five of the six jobs identified in a labor market survey (EX 36) appeared to be within the work restrictions that he outlined for the Claimant. *Id.* at 19-21.[4] He stated that the Claimant might have difficulty performing one job as a service station attendant for C.N. Brown because it required some tire changing. *Id.* at 20. He also said that this job, which involved driving, might be inappropriate because of the Claimant's use of narcotic pain medication. *Id.* at 21. Dr. Pier did not believe that the Claimant's difficulties with concentration would be a concern on any of the jobs, but he could not provide a definitive answer as to whether the Claimant's problems with concentration and reliability due to his headaches because "[i]t's completely based on a subjective experience of the patient." *Id.* at 21-22.

[4] The Claimant's objection to this testimony on the ground that Dr. Pier had not examined the Claimant since 2003 and had not reviewed more recent medical records is overruled in light of the Claimant's testimony that his condition has not significantly changed since he underwent surgery. TR 50.

On cross-examination by the Claimant's attorney, Dr. Pier stated that he would defer to Dr. Muscat "certainly for treatment, and what Mr. Firczak's capabilities are at this time in the sense that he is treating with [Dr. Muscat] at this time, and I also respect Dr. Muscat." *Id.* at 26. He further testified that while he did not believe that the physical nature of the jobs identified in the labor market survey would worsen the Claimant's condition, the "true question is whether Mr. Firczak can concentrate and tolerate the pain enough to do these activities . . . [which] is impossible to objectify." *Id.* at 27. On re-direct, he explained that he had concerns regarding the Claimant's psychological status, but he would defer to Dr. Muscat's treatment plan, though he thought that any psychological aspects "can hopefully be delved into from the aspect of teaching coping skills and strategies, relaxation skills and strategies." *Id.* at 28-29.[5] He continued that he would defer to Dr. Muscat's judgment on work capacity since he hadn't seen the Claimant for two years but, assuming that there had been no change in the Claimant's condition, he would stand by the restrictions in his M-1 form with two caveats – "one, was that headaches may limit concentration" and "two, headaches may limit reliability." *Id.* at 29. He further testified that there was no physical reason that the Claimant could not attempt to perform a job within his physical restrictions, and he added that the Claimant's capacity would be best assessed by a trial. *Id.* at 29-30. "In other words, what can this gentleman do on a day-by-day basis, and is there something this gentleman can do that is transferable into the workplace?" *Id.* at 30.[6] Regarding the Claimant's complaints of headache pain, Dr. Pier testified that there was a discrepancy between the Claimant's report of "off the scale" pain (12 of a scale of 1-10) and his ability to sit in the examination room and answer questions. *Id.* at 32. However, he also stated that there was no evidence of symptom magnification, and he said that he was not questioning that the Claimant experiences pain:

> [I]n no means does that mean he was not telling me the truth or does not have pain. There was some discrepancy, but I'm not saying right here that this man was not inaccurate [sic].

Id. at 32-33. Finally, Dr. Pier testified that he was not surprised that the Claimant did not suffer any concussion or injury to his head as a result of the March 4, 2002 incident. *Id.* at 33. He explained that the source of the Claimant's pain is cervical and that his hard hat served to protect his skull while transferring the force of the impact into the cervical spine. *Id.* at 33-34.

C. Vocational Evidence

Christopher O. Temple, M.Ed, CRC, a certified rehabilitation counselor retained by BIW, prepared a vocational evaluation and list of suitable and available jobs. EX 36. He testified that, based on the restrictions imposed by Dr. Pier on August 11, 2003, and a meeting with Mr. Firczak, it is his opinion that there are a number of light duty jobs available to this Claimant. TR 70-71. In his report of May 20, 2005, Mr. Temple listed eight available jobs that he considered to be compatible with the work restrictions on Dr. Pier's M-1 form: (1) Store Greeter at Sam's Club; (2) Cashier at Lampron's Service Station; (3) Gas Attendant at Texaco Express; (4) Gas Station Attendant at C.N. Brown; (5) Gas Station Attendant at Mile 81 Travel Plaza; (6) Parking

[5] There is no evidence that the Claimant has received any training in coping or relaxation skills and strategies.
[6] Neither party questioned Dr. Pier about the Claimant's unsuccessful attempt to work in the commissary store, and there is nothing in Dr. Pier's testimony that indicates that he was aware of this work attempt.

Garage Attendant at APCOA Parking; (7) Security Guard at ACE Security; and (8) Retail Sales Clerk at The Sunglass Shop. EX 36 at 204; TR 73. Mr. Temple testified that these jobs are available with part-time or full-time hours and included training. TR 73-82. He further testified that these jobs are routinely available on an ongoing basis in the Claimant's labor market. TR 84. He further identified several other positions that had been available or would become available in the near future, and he stated that it is his opinion that the Claimant has the capacity to earn $7.27 per hour, with a good chance of being offered fringe benefits, including health insurance. EX 36 at 206; TR 83. Mr. Temple acknowledged that he had not considered the M-1 forms completed by Dr. Muscat. TR 86. He also said that he had not asked any of the employers in his labor market survey whether an employee's use of narcotic pain medication would impact on their willingness to hire or whether they would allow an employee to lie down to relieve symptoms, but he acknowledged that it is unlikely that they would offer such an accommodation. TR 86-87. However, he testified that he did consider the Claimant's concentration and neck extension limitations by trying to find easy jobs that were not mentally challenging and would not require him to routinely move his neck. TR 87-88.

D. Is the Claimant entitled to disability compensation?

The Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). Disability under the Act involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

1. Nature of Disability

As discussed above, the parties have stipulated that the Claimant reached a point of maximum medical improvement on September 8, 2004 which is based on the medical opinion of his treating neurosurgeon, Dr. Muscat. As the evidence establishes that his symptoms have persisted for a lengthy period and that there is no medical expectation at this point of significant future improvement, I find that any disability since September 8, 2004 has been permanent in nature. *See Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979).

2. Extent of Disability

The parties disagree on whether the Claimant has sufficiently recovered so that he has a post-injury wage-earning capacity. A claimant establishes a *prima facie* case of total disability by showing that he is unable to return to his usual employment because of a work-related injury. *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 608 (1st Cir. 2004) (*Preston*). "Once a claimant demonstrates an inability to return to his job because of a work-related injury, he is considered totally disabled within the meaning of [the Act] and the burden shifts to the employer to prove the availability of suitable alternative employment in the claimant's community." *Preston,* 380 F.3d at 608*, quoting Palombo v. Director, OWCP*, 937 F.2d 70, 71 (2d Cir. 1991).

There is no question that the Claimant has carried his *prima facie* burden of establishing that he cannot return to his usual employment as a marine electrician. BIW itself determined that

it had no work available within the work restrictions imposed by Dr. Mazorra, which are less stringent than those recommended by Dr. Pier, and BIW has not argued that the Claimant can return to his pre-injury job in the shipyard. Accordingly, I find that the Claimant has successfully made out a *prima facie* case of total disability. Therefore, the burden shifts to BIW to show that suitable alternative employment is readily available in the Claimant's community for an individual with the same age, experience, and education. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991).

To meet this burden, BIW has introduced Mr. Temple's vocational assessment and labor market survey which establishes that there are a number of jobs available in the Claimant's community which are compatible with the physical work restrictions outlined by Dr. Pier whose opinions I credit as particularly well-reasoned, thoughtful and supported by the objective medical evidence. The question is whether the evidence shows that the Claimant would nonetheless be precluded from performing any of the alternative jobs because of his subjective complaints of debilitating headaches. *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 237 (1981) (credible subjective complaints alone may support an award of permanent total disability compensation but not where medical evidence unequivocally establishes the absence of a continuing disability), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). On this question, BIW contends that there is no objective evidence to substantiate the Claimant's complaints and Dr. Muscat's conclusion that he has no work capacity, and it asserts that the Claimant's testimony is self-serving and so fraught with inconsistencies that it is undeserving of much, if any, weight. BIW Brief at 8-9. Specifically, BIW argues,

> This [absence of objective support] is particularly glaring given the discrepancy in the medical records concerning Mr. Firczak's noted presentation and demeanor and his claimed degree of symptoms. Dr. Pier, for instance, notes that, though Mr. Firczak reported to have level 12 pain out of a scale of 1 to 10, he was "sitting comfortably talking to me." (ERx 18 at 138.) Dr. Muscat's reports show a history of the same discrepancies. On August 11, 2003, for example, Dr. Muscat notes Mr. Firczak "does not appear uncomfortable in the office today," though he reported a level 10 pain. (ERx 17 at 126.) On October 10, 2003, Dr. Muscat notes that Mr. Firczak reports to be "about the same," but he "smiles spontaneously and displays no pain behavior." (*Id.* at 125.) Again, on December 9, 2003, Mr. Firczak reports that his symptoms have not changed, but he does not display pain behavior. (*Id*. at 123.) Similarly, Dr. Robinson reported that, though Mr. Firczak reported constant neck pain, he was, in general, alert, cooperative, and in no acute distress. (ERx 29 at 181-82.) Dr. Robinson also noted that he did not suspect any serious intracranial problems insofar as Mr. Firczak was concerned. (*Id.* at 182.) All of these records suggest that Mr. Firczak was greatly exaggerating his symptoms in order to enhance his case. In fact, clearly in preparation of hearing, Mr. Firczak testified that he actually measured the distance between his and his parents' home (900 feet) in attempt to show that, though he "might" be able to walk there on a good day, the distance is not substantial.
>
> Mr. Firczak's credibility problems and his propensity to exaggerate his symptoms were also demonstrated in his testimony about his original injury and about his

> daily activities. With respect to the original injury, Mr. Firczak mentions for the first time during these proceedings that the incident involved a fall. Yet, in none of the contemporaneous medical records was that fact ever documented. The logical inference, therefore, is that there probably was no fall.
>
> There were also discrepancies in his discussion about his daily activities. For example, though he testified that he generally did not like to drive because he felt he could not safely operate a car, Mr. Firczak also testified that he had absolutely no problems driving to the convenience store to get cigarettes. Also, though he intimates that he has trouble grocery shopping because of his symptoms, he later concedes that he does not go grocery shopping because he does not like to see how much his wife spends on groceries. Finally, he stated that he spends much of his day sitting in his garage at one point in this testimony. Elsewhere, he testified that he spends a substantial amount of time in his recliner. Because of his credibility problems, Dr. Muscat's undue reliance on Mr. Firczak's subjective reports of pain in issuing an opinion on work capacity makes his work capacity evaluations unreliable.

BIW Brief at 10. Certainly, one can, as BIW has done, reasonably question whether the Claimant's pain is at an "off the chart" unbearable level in light of his demonstrated ability to sit through medical examinations and the hearing on his claim which consumed one hour and 55 minutes with two five-minute breaks. However, after critically considering the entire record including my observations of the Claimant's demeanor at the hearing, I conclude that the alleged inconsistencies in the Claimant's testimony are somewhat overstated and that his complaints of pain are credible and not contradicted by the objective medical evidence.

At the outset, I agree with BIW that the Claimant's statement that the accident at work on March 4, 2002 caused him to fall is suspicious since there is no mention of a fall in any of the medical records. In addition, the Claimant's testimony that he measured the distance from his home to his parents' could be viewed as indicative of an effort to validate his claims of incapacity. On the other hand, he answered all questions at the hearing in a careful, deliberate and factual manner and showed no tendency to try to "sell" his claim of disability. For example, he did not ask for any breaks or other accommodations while on the witness stand, and he only acknowledged any problems or discomfort when directly asked by his attorney or the court. TR 37, 45. He also appeared to be a man of few words who is not particularly forthcoming with details and who appears to have some memory deficits.[7] Therefore, it is entirely possible that he either never mentioned the fall to any of the doctors or that he is simply confused three years after the fact regarding the precise details. In either case, the explanation would be innocent and not indicative of a recent fabrication to bolster his claim. This record does not provide a clear answer, and I consider it to be improper to discredit any witness based on less than substantial

[7] Dr. Attfield noted that the Claimant was a "forthright young man who provided a well intended but vague history of events." CX 2 at 8. The Claimant's memory difficulties was also demonstrated at the hearing by his inability to remember the name of his family doctor and his confusion over whether he finished working the second four-hour shift at the commissary store. TR 49, 57. That is, the Claimant testified that he completed two four-hour shifts, while the records from Ms. Bogg indicate that he was unable to complete the second shift. EX 15 at 51. The Claimant also testified that his memory is poor. TR 36-37.

evidence of untrustworthiness. The Claimant's statement about measuring the distance to his parent's house is similarly susceptible to a benign explanation (*e.g.*, simple curiosity or perhaps a land survey), and the statement was not pursued on cross-examination to determine if it was indeed reflective of an effort to enhance his chances of litigation success. As to the other alleged discrepancies, the Claimant readily acknowledged his ability to drive to the store for cigarettes and that he only has problems backing up. TR 33, 65-66. And, his testimony about spending time in his father's garage was given in response to questions about his activities on "good" days, while his testimony about spending most of the day in a recliner referred to "bad" days. TR 38, 41. More importantly, there is no indication in the record that any physician has questioned the sincerity of the Claimant's subjective complaints, and Dr. Pier emphasized that while he felt that the Claimant's complaints were not consistent with his objective presentation, he saw no evidence of symptom magnification and did not disbelieve the Claimant as his complaints, albeit unusual, are within the realm of possibility. For these reasons, and noting additionally the absence of any evidence such as surveillance films showing that the Claimant is capable of a greater level of activity than he admits, I find that the Claimant's subjective complaints of disabling headache pain, which are supported by the reports of no work capacity from his treating neurosurgeon, are credible. Based on the finding that the Claimant's subjective complaints are credible, and given Dr. Pier's caveats about the Claimant's concentration and reliability issues in combination with Mr. Temple's admission that it is unlikely that any employer would accommodate an employee's need to lie down for pain mitigation, I conclude that BIW has not met its burden of producing evidence of that suitable alternative employment is available in the Claimant's community.

The conclusion that BIW has not carried its suitable alternative employment burden need not rest on a credibility determination alone. The Claimant also argues that the jobs identified by Mr. Temple cannot be considered suitable because Mr. Temple did not ask any of the prospective employers whether the Claimant's use of narcotic pain medication would impact on the availability of the jobs. There is no evidence in the record that the Claimant's prescribed medications cause any side effects that would impact on his ability to perform the alternative jobs with the exception of the service station attendant position excluded by Dr. Pier. *C.f. Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041-1042 (2d Cir. 1997) (affirming ALJ's rejection of alternative jobs where employer's vocational expert failed to account for the effects of the claimant's use of Thorazine on his vision); *Wolff v. Marine Terminals Corp*., 38 BRBS 506, 513 (ALJ 2004) (rejecting alternate jobs based on medical testimony that claimant used Vicodin which slows reaction time and vocational testimony that the employer's safety code prohibited employment of workers whose use of medication would interfere with their ability to perform their jobs). The absence of medication side effects, however, does not answer the legitimate question of whether the Claimant's use of narcotic medication would negatively impact an employer's willingness to hire. Since the case law is clear that alternate jobs must be compatible with all of the injured worker's limitations whether they be physical, psychological or educational, I further find that Mr. Temple's failure to inquire about the potential impact of the Claimant's use of narcotic medication prevent his labor market survey from being credited as establishing the existence of suitable jobs. *See White v. Peterson Boatbuilding Co*., 29 BRBS 1, 12-13 (1995).

E. Compensation Due

Since BIW has not shown that suitable alternative employment is available, I conclude that the Claimant is entitled to an award of permanent total disability commencing on September 8, 2004. Section 10 of the LHWCA provides compensation shall be based upon an employee's average weekly wages calculated at the time of injury. 33 U.S.C. § 910; *Hall v. Consolidated Employment Systems, Inc*., 139 F.3d 1025, 1029-1030 (5th Cir. 1998); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). The parties have stipulated that the Claimant's average weekly wages at the time of the injury were $666.74. Therefore, the Claimant's compensation will be based upon his average weekly wages of $666.74 at the time of his work-related injury on March 4, 2002.

F. Credits and Interest

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due." 33 U.S.C § 914(j). This provision allows the employer a credit for its prior payments of compensation against any compensation subsequently found to be due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *on recon., aff'd*, 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989). As the record shows that BIW has been voluntarily paying the Claimant temporary total disability compensation, it is entitled to a credit in the amount of such payments against its liability for permanent total disability compensation.

Because section 10(f) of the LHWCA contains a provision for annual cost of living increases to permanent total disability compensation, BIW's temporary total disability compensation payments may have been less that the amount of permanent total disability compensation that he had been entitled to receive since September 8, 2004. Accordingly, I find that the Claimant is entitled to an award of prejudgment interest on any amounts of compensation not timely paid. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

G. Attorney's Fees

The Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA because he utilized the services of an attorney in successfully establishing his right to compensation. *See Lebel v. Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney has filed an application for attorney's fees and litigation costs totaling $8,051.00. BIW will be allowed 15 days from the date this decision and order is filed with the OWCP District Director in which to file any objection to the fee application.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, the following compensation order is entered:

(1) Bath Iron Works Corporation as a self-insured employer shall pay to the Claimant John C. Firczak permanent total disability compensation pursuant to 33 U.S.C. § 908(a), commencing on September 8, 2004 and continuing until further order, based on an average weekly wage of $666.74 which yields a compensation rate of $444.49 per week, plus the applicable annual adjustments provided in 33 U.S.C. § 910(f) and interest on all past due compensation, computed from the date each payment was originally due until paid and based on a rate determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(2) Bath Iron Works Corporation shall be allowed a credit pursuant to 33 U.S.C. § 914(j) in the amount of its voluntary payments of temporary total disability compensation since September 8, 2004;

(3) Bath Iron Works Corporation shall have 15 days from the date this Decision and Order is filed with the District Director to file any objection to the application for attorney's fees filed by the Claimant's attorney; and

(4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts